

***United States Court of Appeals
for the Second Circuit***

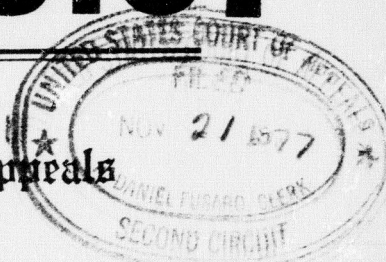


**APPELLANT'S
BRIEF**

77-6107

United States Court of Appeals

FOR THE SECOND CIRCUIT



UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—against—

BERTRAM L. PODELL,

Defendant-Appellant.

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P/S

DEFENDANT-APPELLANT'S BRIEF

DANIEL M. SHIENTAG
Attorney for Defendant-Appellant
160 Broadway
New York, N. Y. 10038
(212) 267-0363

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-6107

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—against—

BERTRAM L. PODELL,

Defendant-Appellant.

DEFENDANT-APPELLANT'S BRIEF

This is an appeal from a Judgment entered in the United States District Court of the Southern District of New York, on the 16th day of August, 1977, in favor of the United States of America and against the Appellant, in the amount of \$40,000 plus costs, upon the decision of Judge Kevin T. Duffy, dated May 30, 1977.

Issues Before the Court

Does the Complaint state a cause of action against BERTRAM L. PODELL, for an accounting based upon breach of trust?

Does BERTRAM L. PODELL's plea in United States v. Podell 73 Cr. 675 constitute an admission of each and all of the allegations contained in the conspiracy count as amended (portions of Count 1) and substantive count (Count 5) of the Indictment?

Does BERTRAM L. PODELL's plea in the criminal case estop him from contesting the amount or nature of the compen-

sation described in the portions of the Indictment to which he pleaded to?

Is BERTRAM L. PODELL liable, personally, to the Government for each and every payment presented, as part of the Government's case, in the aborted criminal trial, as a matter of law?

Does the New York State Statute of Limitations applicable causes based on fraud apply herein?

Nature of the Case

The Government's complaint alleges that, commencing in or about December, 1968, BERTRAM L. PODELL (hereinafter "PODELL") while a Member of Congress, conspired with various representatives of LEASING CONSULTANTS INCORPORATED ("LCI"), and FLORIDA ATLANTIC AIRLINES (FAAL) to defraud the Government, obstruct its agencies and deprive the Government of the "honest, unbiased and unencumbered services" of defendant and to violate Sections 201 and 203 of Title 18 USC (4A).

The complaint further alleges that pursuant to the conspiracy, PODELL used and exploited his position as a member of Congress to obtain meetings with Government officials, information and informal views and opinions of officials and to influence various agencies to act favorably to LCI and FAAL. It is also alleged that pursuant to the conspiracy and in consideration for PODELL's conduct, he received "either directly or as purportedly legal fees or campaign contributions", the approximate amount of \$41,350.

Finally, it is alleged that the foregoing conduct constituted a breach of PODELL's fiduciary duty to the Govern-

ment and by reason thereof he is liable and accountable to the Government.

The second count in the complaint reiterates the first cause of action and further alleges an unjust enrichment of PODELL thereby.

The answer denies all of the material allegations of the complaint and asserts an affirmative defense of Statute of Limitations.

Course of Proceedings Below

After service of the pleadings, the Government moved for summary judgment. The motion was submitted on April 5, 1977 and, subsequently, decided in favor of the Government to the extent of \$40,000 by the decision of Judge Kevin T. Duffy, dated May 30, 1977.

The Government subsequently waived its claim for the balance of \$1,350 asserted in the complaint.

PODELL then moved for reargument or, alternatively, and in the interests of justice, reconsideration in the light of the decision of Judge Rudin in Matter of LEASING CONSULTANTS, INC. 70 B 656 (ED NY).

Reargument was granted but the Court below adhered to its prior decision.

Statement of Facts

On October 1, 1974, the defendant entered a plea of guilty to one count of a violation of Title 18 USC §203(a) and one count of conspiracy to violate said section (Title 18 USC §201).

Upon the entry of the plea, the following statement was made by the defendant in response to the court's request

for him to "tell me in your own words what it is you did in respect to the counts you are pleading guilty to so I can be satisfied that you are, in fact, guilty", and to which the defendant replied:

"DEFENDANT PODELL: If the court pleases while a Member of Congress and acting as a lawyer for Florida Atlantic Airlines and paid by Leasing Consultants, Inc., I appeared before various federal agencies, including the CAB, the FAA, and advocated the interests of the said Florida Atlantic Airlines.

I was indirectly compensated through my law firm for these appearances before the CAB and FAA while a Member of Congress. I did not at the time know that I was violating any law, but I intended to do what I did".

At the same time, the Assistant United States Attorney stated:

"It is the Government's position that the plea to the conspiracy count admits that the object of this conspiracy was to violate the conflict of interest law and thereby to defraud the United States."

In support of the motion for summary judgment, the Government submitted copies of three (3) checks, one dated January 7, 1969, in the amount of \$10,000, payable to the firm of PODELL & PODELL, drawn upon the account of LEASING CONSULTANTS INCORPORATED; one dated March 13, 1969, in the amount of \$2,350. payable to PODELL & PODELL, drawn upon the account of LEASING CONSULTANTS INCORPORATED, and one dated May 1, 1969, in the amount of \$29,000. payable to the Citizens Committee for BERTRAM L. PODELL, drawn upon the account of MARTIN MILLER (72A-76A).

The Government also submitted excerpts from the transcript of proceedings in the criminal case on a motion by MARTIN MILLER to dismiss the indictment and suppress evidence (to which PODELL was not a party), the sum and substance of which was that he, MARTIN MILLER, had made a campaign contribution to PODELL's campaign fund, in the amount of \$29,000. (162A), and PODELL's testimony that he had instructed the mailing of the December 19, 1968 bill for \$10,000 after his return from Freeport, Bahamas.

No other testimony in or out of the criminal proceedings relevant to the checks and payments described above, was submitted.

The counts of the indictment, as amended, at the time of the plea consisted of the following:

COUNT ONE

1. From in or about March 1968, up to and including the date of the filing of this indictment, in the Southern District of New York and elsewhere, BERTRAM L. PODELL . . . and MARTIN MILLER, the defendants, and Kenneth G. Burnstine, and Michael Zorovich, names as co-conspirators but not as defendants, did combine, conspire, confederate and agree together and with each other and with other persons to the Grand Jury known and unknown, to violate Section . . . 203 of Title 18, United States Code and to defraud the United States and its departments, agencies and branches by obstructing, hindering and impairing said departments, agencies and branches in connection with the performance of their lawful governmental functions, including; the lawful governmental functions of the United States Congress and the legitimate representation by its Members of the interests of the United States and their constituents; the lawful governmental

functions of the Civil Aeronautics Board (CAB), the Federal Aviation Administration (FAA) . . . in considering and approving routes for international air travel; the lawful governmental functions of the FAA in its determinations as to revocations of operating certificates. . . .

* * *

5. Among the means by which the defendants and their co-conspirators would and did carry out the unlawful purposes set forth above, were the following:

* * *

(b) The defendant, BERTRAM L. PODELL, would and did, travel to the Bahama Islands to speak to United States and Bahamian officials, and send letters and make telephone calls to, and attend meetings with, officers and employees of the United States and of agencies and departments thereof, including the CAB, the FAA . . . for the purpose of affecting, inducing, and pressuring said officials, officers and employees on behalf of FAAL.

(c) The defendant, MARTIN MILLER, and co-conspirators Kenneth G. Burnstine and Michael Zorovich would and did offer, and would and did indirectly pay and caused to be paid, money and other things of value to the defendant, . . . BERTRAM L. PODELL . . . and others, in the form of payments to the Citizen's Committee for the Reelection of Bertram L. Podell and in the form of fees to the law firm of Podell & Podell, and the defendant . . . BERTRAM L. PODELL . . . would and did agree to receive and did receive money and other things of value in return for the services described in paragraphs 5(a) and (b) of this count.

COUNT FIVE

From in or about December, 1968, up to and including September 24, 1970, in the Southern District of New York, BERTRAM L. PODELL, a Member of Congress . . . the defendant . . . unlawfully, wilfully and knowingly otherwise than as provided by law for the proper discharge of official duties, directly and indirectly did receive and agree to receive, ask, demand, solicit, and seek compensation for services rendered and to be rendered by the defendant BERTRAM L. PODELL and others in relation to proceedings, applications, requests for rulings and other determinations, controversies and other particular matters in which the United States was a party and had a direct and substantial interest, before departments, agencies and officers of the United States, namely, an application by FAAL for a route designation then pending before the CAB . . . and a proceeding for suspension and revocation of FAAL's operating certificate then pending before the FAA and the National Air Transportation Safety Board (59A, 38A-41A, 46A).

In opposition to the motion, PODELL submitted an affidavit in which he stated, that he had entered the plea in the criminal case based upon his belief (after conferring with counsel) that his testimony established a \$1,000 per month retainer agreement between a firm known as PODELL & PODELL and LCI, commencing March, 1969; that the independence of that firm could not be established; that he had performed services for LCI before Government agencies in and after March, 1969; and that, accordingly, a violation of the statute had occurred (221A-222A).

PODELL also said that he did not then, or later, intend to equate any of the fees paid prior to his meeting with JOHN DREGGE at the CAB in March, 1969 (22A, 254A-257A).

It was his understanding, PODELL said, that by his plea he was admitting only that which was contained in the allocution, namely, that he had been indirectly compensated through his law firm for advocating LCI's interests before federal agencies (22A).

Upon the motion for reargument and reconsideration the attorney who had represented PODELL in the criminal case, JAMES M. LaROSSA, submitted an affidavit stating:

(a) That, with the permission of the trial court, an agreement was reached to limit the plea to the contents of the allocution, and

(b) That, at no time did PODELL admit or agree to plead guilty to having received the \$29,000 campaign contribution in violation of the conflict of interest statute (301A-302A).

Except for a small portion of PODELL's testimony, no part of the trial transcript in the criminal case was submitted to or considered by the court below.

POINT I

Podell's Plea Does Not Determine Either the Means or Overt Acts Used to Effectuate the Conspiracy.

The Court below erroneously held that "defendant did not plead guilty to a general count of conspiracy; rather his plea of guilty was directed at specific and carefully delineated portions of the conspiracy charge of the indictment, namely, paragraphs 1 and 5(b) and (c) of Count 1 with certain deletions; * * * thus, defendant's plea constitutes an admission of the contents of those counts, including the source and means of his compensation." (284A-285A).

PODELL, in fact, pleaded to a *general* count of conspiracy to commit a conflict of interest and to defraud the United States. The various means by which PODELL and his co-conspirators carried out the conspiracy are set forth in 2(b) and 2(c) of Count One.

The deleted portions did not relate to the conflict of interest statute (18 USC §203). They related to various other counts in the indictment such as bribery and influence peddling.

PODELL did not plead to any of the 13 overt acts alleged in the indictment (42A-43A) which included the three checks and payments involved herein of \$10,000, \$2,350 and \$29,000.

If the Court's reasoning is correct, i.e., that PODELL was admitting each allegation of the portion of Count 1 to which he pleaded, then it must also follow that he was denying (or at least not admitting) what was deleted including the overt acts and particularly, the three payments.

No authority for the proposition advanced by the Court below was cited.

The law is well settled that a criminal conviction estops a defendant in a subsequent civil case from contesting those matters on which a conviction rests.

Emich Motors v. General Motors, 340 U.S. 558, 568-569 (1951).

Such estoppel exists whether the judgment of conviction resulted from a trial or a guilty plea, *United States v. Ben Grunstein & Sons, Inc.*, 127 F. Supp. 907, 909 (D.C. N.J. 1955).

The estoppel, however, extends only to those issues essential or indispensable to a guilty verdict or plea.

Emich Motors, supra;

United States v. Warner, 211 F.2d 669 (7th Cir. 1954);

United States v. Guzzone, 273 F.2d 121 (2nd Cir. 1959).

A plea of guilty to a general conspiracy count therefore only admits the essential elements of the charge and does *not* determine which of the particular *means* or overt acts charged in the indictment were used to effectuate the conspiracy.

United States v. Warner, supra, at 672;

United States v. Ben Grunstein & Sons, supra;

United States v. Guzzone, supra, at 123;

United States v. American Packing Corp., 113 F. Supp. 223, 225 (D.C. N.J. 1953).

That proposition was clearly set forth by the Court in *United States v. Ben Grunstein & Sons*:

"But since in a criminal conspiracy case proof of the unlawful agreement between the parties, plus the commission of any overt act, not necessarily all those alleged, suffices to support a verdict of guilty, no conviction of a criminal conspiracy, whether on verdict or plea, suffices of itself, *without further evidence*, to prove that defendant either admitted, or was found guilty by the jury, of committing any particular overt act. Nor, if the conspiracy is alleged to have been effectuated . . . by a number of means, each of which would have sufficed therefor, can it be determined on a plea of guilty to such count, which of such means were admitted by the defendant to have been adopted for that purpose . . . All that such plea admits is "the existence of the conspiracy as charged * * * as well as

participation therein by the defendants so pleading", 127 F.Supp. at 910 (citations omitted) (Emphasis added).

The Court in *United States v. American Packing Corp.*, *supra*, in finding that a plea of guilty to a charge for conspiracy must be confined to an admission to having participated in the conspiracy, relied on an additional, but important, basis for its holding:

"In matters affecting criminality, not only statutes but also pleas of guilty must be construed strictly and must be limited to the narrowest confines consistent with an intelligent interpretation of the effect thereof." 113 F. Supp. at 225.

Since PODELL's plea to the first count does not suffice of itself to prove that respondent admitted any particular means in effecting the conspiracy, the Court should have examined other evidence relating to the plea to make such a determination. Primary sources of this evidence would have been the hearing on respondent's motion to withdraw his plea of guilty in *U.S. v. Podell* (Appellants' Joint Appendix on Appeal in *U.S. v. Podell et al.* in United States Court of Appeals for the Second Circuit, pp. 65-179); the testimony of JAMES LAROSSA, PODELL's counsel at the criminal trial; and the Government counsel upon the criminal trial. These are the means which could have served to define the agreement whereby PODELL was permitted to plead guilty by reading a statement *prepared by the government* of narrowly drawn, tightly limited admissions of fact, which were to be all that PODELL would confess.

While the counts to which respondent pleaded were "carefully delineated", elimination of paragraphs in Count One simply removed bribery and influence peddling as

objects of the conspiracy; a *general* count of conspiracy to commit conflict of interest remained. PODELL, as would be true with any defendant pleading to a general conspiracy, therefore, admitted only the existence of the conspiracy as well as the fact of his participation therein. *United States v. Ben Grunstein. & Sons, Inc., supra*. He did not, through that guilty plea, admit to all of the various means and overt acts charged in the indictment, as amended, nor is he required to repay every fee ever paid to him or his firm by LCI.

The fees paid for PODELL's appearance before the CAB or other federal agency would still have to be proved. Indeed, the Court below recognized this by rejecting the Government's claim to \$1,350 paid by LCI for the trip of HYMAN PODELL to Puerto Rico (290A).

See: United States v. Fabric Garment Co. Inc.,
366 F.2d 530 (2nd Cir. 1966).

POINT II

No Cause of Action Exists for Recovery by the Government of a Fee Paid by a Third Party Which Violates Sec. 203(a) of Title 18.

The Government did not make any payment to, or confer any benefit upon either defendant or any third person which it is seeking to recover here.

Indeed, there is a specific statute which would cover that situation, namely, §218 of Title 18, which authorizes the recovery by the United States anything and everything transferred by it or its agents "in relation to which there has been final conviction for any violation of this chapter.***"

The omission of Congress to provide any similar remedy with respect to any compensation paid by third parties contravening §203(a), cannot, in the light of Section 218 be deemed accidental.

Although §203(a) and its predecessors have been in force for over 70 years and there have been a number of prosecutions and convictions under it, it does not appear, that prior to the instant case, there has been any action brought by the Government to recover such fees.

In the absence of a specific statute actual legal damage must result in order for a common law conspiracy to be actionable.

United States v. Guzzone, 273 F.2d 121 (2nd Cir. 1959);

United States v. Kates, 419 F. Supp. 846 (E.D. Pa. 1976).

Each of the cases in which the Government did bring an action and recovered involved a payment to a legislator or agent for the purpose of influencing either his vote or his official action, i.e., a bribe.

Cf. United States v. Carter, 217 U.S. 286 (1910);

U.S. v. Drisko, 303 F. Supp. 858 (E.D. Va. 1969).

None of this pertains here. All taint of bribery was specifically negated by the Government's own admission at the time of the plea.

Consequently, if the Government has any claim at all, it would necessarily have to arise out of some common-law cause of action for fraud in which actual damages would have to be proved.

POINT III**An Action to Recover on the Ground of Common-Law Fraud if Brought by the Government Would Be Barred by the New York Statute of Limitations.**

§213 of the New York Civil Practice Law and Rules provides that an action based on fraud must be commenced within six years from the date of actual discovery or when the fraud could have been discovered with due diligence.

§203(f) CPLR further limits this period of time to the longer of either two years from actual or imputed discovery or six years from the date of accrual.

Accordingly, the statute would have expired in New York in an action based on fraud either on May 1, 1975 or June 27, 1975.

Since it is undisputed that both defendant and LCI were residents of the State of New York, and it appears from the complaint that the activities for which the Government seeks redress, were arranged for and agreed upon within the State of New York, any cause of action on account thereof, would have arisen in New York.

Consequently, the Government's claim, should it see fit to amend the complaint or start a new action, would be barred by the Statute of Limitations.

CONCLUSION

The Judgment of the Court below should be revised and the motion of the United States for summary judgment should be denied and the complaint dismissed.

Respectfully submitted,

DANIEL M. SHIENTAG
Attorney for Appellant

